82 - 300

No.

Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE TRAVELERS INSURANCE COMPANY,
APPELLANT

v.

COMMONWEALTH OF MASSACHUSETTS

On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts

JURISDICTIONAL STATEMENT

LANE MCGOVERN
Counsel of Record
STEVEN A. KAUFMAN
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100
Attorneys for Appellant, The Travelers Insurance Company

Blanchard Press, Inc., Boston, Mass.—Law Printers

QUESTIONS PRESENTED

Is G.L. c. 175, § 47B ("Section 47B"), as applied to insured employee benefit plans which are the product of collective bargaining, preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA")?

A. Does Section 47B interfere with the free negotiation of employee health benefits, a mandatory subject of collective bargaining?

B. Does the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, exempt from preemption state statutes which concern insurance and which conflict with federal labor policies embodied in the NLRA?

C. Is there any exception from NLRA preemption for local health regulations? If there is, does Section 47B fit within it?[1]

---

[1] The Travelers Insurance Company and Metropolitan Life Insurance Company were the appellants in the Supreme Judicial Court of Massachusetts. Metropolitan will also docket an appeal to this Court and will discuss preemption under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a). Travelers joins in Metropolitan's arguments concerning ERISA and incorporates them by reference in this Jurisdictional Statement.

In accordance with Rule 28.1 of the Rules of this Court, Travelers states that it has no subsidiaries other than wholly-owned subsidiaries. Its parent company is The Travelers Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
THE QUESTIONS ARE SUBSTANTIAL	6
The NLRA Preempts Section 47B	6
I. By Mandating Insertion Of Substantive Health Benefit Terms Into Insured, Collectively Bargained Employee Benefit Plans, Section 47B Interferes With The Free Negotiation Of Mandatory Subjects Of Collective Bargaining	8
II. The McCarran-Ferguson Act Does Not Exempt From Preemption State Statutes Which Concern Insurance And Which Conflict With Federal Labor Policies Embodied In The NLRA	13
III. Section 47B Is Not Excepted From NLRA Preemption On The Ground That It Is A "Local Health Regulation"	17
CONCLUSION	22

Page

APPENDIX A

Opinion of the Supreme Judicial Court for the Commonwealth Of Massachusetts 1a

APPENDIX B

Judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts 23a

APPENDIX C

Findings and Conclusions of the Superior Court Department of the Trial Court, Suffolk County 24a

APPENDIX D

Initial Judgment of the Superior Court Department of the Trial Court, Suffolk County 51a

APPENDIX E

Final Judgment of the Superior Court Department of the Trial Court, Suffolk County 55a

APPENDIX F

Memorandum of Decision of the Trial Court on Commonwealth's Motion for a Preliminary Injunction 59a

APPENDIX G

Order of Justice Brennan Extending Time for Docketing the Appeal 73a

APPENDIX H

Text of Statutes Involved 74a

APPENDIX I

Notice of Appeal to the Supreme Court of the United States 82a

Table of Authorities

Cases

Page

Alessi v. *Raybestos-Manhattan*, 451 U.S. 504 (1981).. 9, 10

Allied Chemical & Alkali Workers of America, Local Union No. 1 v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)..... 8

Farmer v. *United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290 (1977).. 9, 10, 18, 19

H. K. Porter & Co. v. *NLRB*, 397 U.S. 99 (1970).....10, 19

John Hancock Mutual Life Ins. Co. v. *Commissioner of Insurance*, 349 Mass. 390 (1965)..... 15

Local 24, International Brotherhood of Teamsters v. *Oliver*, 358 U.S. 283 (1959)..... 9, 10, 17, 18, 20

Lodge 76, International Association of Machinists v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976)..... 9, 10, 20, 21

Malone v. *White Motor Corp.*, 435 U.S. 497 (1978)..... 17

Metropolitan Life Insurance Co. v. *Whaland*, 119 N.H. 894, 410 A.2d 635 (1979)..... 16

New York Telephone Co. v. *New York State Dept. of Labor*, 440 U.S. 519 (1979)..... 10, 21

NLRB v. *Nash-Finch Co.*, 404 U.S. 138 (1971)..... 9

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959)..... 8, 9, 10, 17, 18

Sears, Roebuck & Co. v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).... 10, 18, 19

SEC v. *National Securities, Inc.*, 393 U.S. 453 (1969)... 14, 15, 16

Wadsworth v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978)..... 16

Page

Wilkes-Barre Publishing Co. v. *Newspaper Guild of Wilkes-Barre*, 504 F.Supp. 54 (M.D. Pa. 1980), *rev'd in part*, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, 71 L.Ed. 2d 295 (1982) 18, 19

W. W. Cross & Co. Inc. v. *NLRB*, 174 F.2d 875 (1st Cir. 1949) 8

STATUTES

Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ..... I, 1, 2, 3, 5

Massachusetts General Laws

c. 111, § 31C 20

§ 127A 20

§ 191 20

c. 175, § 47B ..... *passim*

McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* ..... I, 2, 7, 13, 16, 17

§ 1012 ..... 13, 14, 15, 16

§ 1014 ..... 13, 14, 15, 16

National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ..... *passim*

MISCELLANEOUS

Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972) 20

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No.

THE TRAVELERS INSURANCE COMPANY,
APPELLANT

v.

COMMONWEALTH OF MASSACHUSETTS

On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts

JURISDICTIONAL STATEMENT

The Travelers Insurance Company ("Travelers") appeals from a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts holding that the Massachusetts "mandated benefit" statute, G.L. c. 175, § 47B, is not preempted by ERISA or by the NLRA.

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, which is reproduced as Appendix A, is reported at 385 Mass. 598.[2] The findings and conclusions of the trial court, entered October 17, 1980 (App. C),

[2] A separately bound appendix has been filed jointly in this Court by appellants Travelers and Metropolitan Life Insurance Company ("Metropolitan").

are not reported. A memorandum of decision by the trial court on the Commonwealth's motion for a preliminary injunction (App. F) is not reported.

JURISDICTION

This is an action for declaratory and injunctive relief brought by the Commonwealth of Massachusetts to require Travelers and Metropolitan to provide the mental health insurance benefits prescribed by the Massachusetts "mandated benefit" law, G.L. c. 175, § 47B ("Section 47B"). In their answer to the Commonwealth's complaint, and during all subsequent stages of the proceedings, Travelers and Metropolitan asserted that Section 47B is invalid as applied to certain of their group health policies on the grounds that it is preempted by ERISA and by the NLRA.

The judgment of the Supreme Judicial Court of Massachusetts (App. B) was entered on March 24, 1982. A notice of appeal to this Court (App. I) was filed in the Massachusetts Supreme Judicial Court on June 2, 1982. On June 4, 1982, Justice Brennan extended the time for docketing the appeal to and including August 21, 1982 (App. G).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(2).

STATUTES INVOLVED

Section 47B of Massachusetts General Laws Chapter 175 and the relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, are reproduced in Appendix H.

STATEMENT OF THE CASE

Proceedings Below

On June 1, 1979 the Commonwealth commenced this action for declaratory and injunctive relief in the Superior Court for Suffolk County, Massachusetts. The Commonwealth's complaint sought (i) a declaration that Section 47B can validly be applied to insured employee benefit plans and (ii) an injunction directing Travelers and Metropolitan to comply with the state statute. On August 28, 1979 an order was issued by the trial court requiring the defendants, pending trial and determination of this action, to provide the mental health benefits mandated by Section 47B in their group health insurance policies issued after January 1, 1976 (App. F).

Trial on the merits occurred from September 22 to 29, 1980. In its findings and conclusions (App. C), the trial court found that Section 47B was not preempted by ERISA or by the NLRA and granted the permanent injunction sought by the Commonwealth. Judgment was entered on October 22, 1980 (App. D). After the Commonwealth moved to amend the judgment, seeking certain changes in the scope and wording of the injunction, a final amended judgment was entered on December 1, 1980 (App. E).

The Supreme Judicial Court of Massachusetts granted the defendants' unopposed application for direct appellate review. In their briefs and oral arguments to the Supreme Judicial Court, Travelers and Metropolitan continued to press their claims that Section 47B is preempted by ERISA and by the NLRA. On March 24, 1982, the Court rejected these claims (App. A) and affirmed the judgment of the trial court (App. B).

Facts

Section 47B, which was enacted by the Massachusetts Legislature in December 1973, became effective on a mandatory basis on January 1, 1976.

A report of the Legislature's Joint Committee on Insurance, which sponsored this legislation, indicates that the Committee was concerned about increasing the opportunity for private psychiatric treatment "[f]or the working persons and their families." The Committee recognized that publicly supported mental health facilities were already "costing Massachusetts taxpayers millions of dollars annually." It also recognized, however, that through the mechanism of a mandated benefit statute there existed "a great potential for increased revenue to the Commonwealth, because of 3rd party payments from insurance companies." App. C. at 40a. Prior to the drafting of the new statute, studies were made of the insured benefit plan experiences of such organizations as the United Auto Workers, the Retail Clerks (Local 770), the Kaiser-Permanente Plan, and the Group Health Association covering federal employees.

The resulting statute, Section 47B, sought to shift a portion of the cost of mental health care in Massachusetts to the private sector. It sought to do this by two means. First, by directly compelling all employee benefit plans (whether insured or uninsured) to provide mental health care benefits to Massachusetts residents "covered under any such . . . plan." And, second, by mandating that all health insurance policies sold to such plans (as well as other health insurance policies) — including insurance policies implementing the terms of collectively bargained plans — must contain the particular provisions for mental health care coverage specified in the statute. The latter provisions have the effect of mandating the benefits that such insured plans provide to their beneficiaries. Only if the plan dispenses with insurance — not merely insurance for mental and nervous conditions but all health insurance — can it avoid the statute's compulsion.

In recent years there has been a surge in the states' use of mandated benefit laws, and it is expected to continue. These laws typically relate to group health insurance policies and require that regardless of whether the policyholder or the

covered employee desires the particular coverage involved, the prescribed benefits must be provided. For example, numerous states have laws relating to insurance coverage for treatment of mental illness, with detailed and varying eligibility rules, deductibles, co-insurance ratios and policy limits.[3] Similar mandated benefit laws cover other types of health services, such as home health care and treatment for alcoholism and drug abuse.

The Commonwealth has not sought to enforce Section 47B to the extent it applies to employee health and welfare plans directly. App. C at 31a. It concedes that ERISA's preemption provisions prevent this. App. C at 47a. The Commonwealth has, however, nevertheless sought to enforce Section 47B to the extent it compels the insertion of mental health provisions in group health insurance policies, including those policies which implement the terms of collectively bargained employee benefit plans.

Travelers has issued numerous group health insurance policies for employee benefit plans. Of its group policies in force, providing medical expense coverage to Massachusetts employees, a certain number were issued to provide benefits for employee benefit plans which are the product of collective bargaining subject to the NLRA. App. C at 31a. The employee medical benefits plan of General Telephone and Electronics Corporation ("GTE"), for which insurance coverage is provided by Travelers, is one example of these collectively bargained plans. The GTE plan covers approximately 608,000 plan participants ranging over 30 states.

---

[3] The statutes relating to mental illness include: Cal. Ins. Code § 10125; Colo. Rev. Stat. § 10-8-116(7)-(11); Conn. Gen. Stat. Ann § 38-174d; Fla. Stat. Ann § 627.668; Ga. Code Ann. 56-3110; Ill. Ann. Stat. ch. 73, § 982e; Kan. Stat. § 40-2, 105; La. Rev. Stat. Ann. § 22:213.2; Md. Ann. Code art. 48A, § 477E; N.H. Rev. Stat. Ann. 415:18-a; N.Y. Ins. Law 162(16); N.D. Cent. Code § 26-39-01 to 26-39-05; Ore. Rev. Stat. § 743.558; Tenn. Code Ann. § 56-1167; Vt. Stat. Ann. tit. 8, § 4089; Va. Code § 38.1-348.7; W. Va. Code § 33-16-3a; Wis. Stat. Ann. § 632.89.

With respect to the insured plans that have evolved from collective bargaining, some of the collective bargaining agreements specify the particular medical expense benefits for employees. Others prescribe the level or amount of contributions to be afforded employees. App. C at 31a. In each case the insurance policy serves as the mechanism for providing the bargained benefits; it implements the terms of the collective bargaining agreement.

Where the collective bargaining agreement specifies the particular benefits to be provided — a common practice — the benefit terms of the collective bargaining agreement and of the insurance policy are usually identical. As collective bargaining brings changes in the plan terms, changes are correspondingly made in the policy terms.

In the collective bargaining process, mental health benefits compete with other insurance benefits and other forms of compensation for inclusion in the collective bargaining agreement. When a state mandates benefits which must be provided, the orderly process of collective bargaining contemplated by the NLRA is disrupted. Clearly, to the extent that mandated benefits must be provided, other benefits of the parties' choice cannot be.

THE QUESTIONS ARE SUBSTANTIAL

The NLRA Preempts Section 47B

The question whether a state, through the medium of a purported insurance statute, may mandate the benefit terms of collectively bargained employee benefit plans is a novel and substantial one. It has never been considered by this Court. Its resolution involves the accommodation of conflicting federal and state interests. A fundamental federal interest is protection of the collective bargaining process from state attempts to dic-

tate or interfere with the substantive terms of collective bargaining agreements. A traditional state interest is continued primary regulation by the states of the "business of insurance," unimpeded by the restrictive effects of federal legislation. Accommodation here of these conflicting federal-state interests necessarily involves the delicate task of defining the appropriate reach and interrelationship of two major federal statutes, the NLRA and the McCarran-Ferguson Act.

Resolution of this problem has widespread importance. State statutes similar to Section 47B, mandating various health benefits for insured employee benefit plans, have been enacted in numerous states other than Massachusetts. Most of these statutes are of relatively recent origin — within the past seven or eight years — and the list is growing. Hundreds of collectively bargained employee benefit plans across the country, and vast numbers of employees covered by such plans, are affected by the determination whether states can or cannot compel collective bargaining agreement changes by means of statutes bearing the banner of insurance.

The desirability of plenary determination by this Court is underscored not only by the question's importance. Plenary treatment is also warranted in light of the fact that the court below deemed it necessary, in denying NLRA preemption, to rely upon two distinctly novel grounds. An "exception" to NLRA preemption was found and used which admittedly this Court itself has never held to exist. Alternatively, an interpretation was assigned to a key section of the McCarran-Ferguson Act — without analysis, in a footnote — which neither this Court nor any other court has ever adopted.

I. By Mandating Insertion Of Substantive Health Benefit Terms Into Insured, Collectively Bargained Employee Benefit Plans, Section 47B Interferes With The Free Negotiation Of Mandatory Subjects Of Collective Bargaining

Among the group insurance policies to which Section 47B applies are policies which implement the health benefit provisions of employee benefit plans which are the product of collective bargaining. Health benefits, including mental health benefits, are mandatory subjects of collective bargaining, as to which employers subject to the National Labor Relations Act have a duty to bargain. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971); *W.W. Cross & Co., Inc.* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949). The effect of Section 47B's application is that mental health benefits specified by the state Legislature are required to be paid to the employee beneficiaries of such a plan, even though the terms of the collectively bargained plan itself do not provide such benefits. The statute, in short, overrides the terms of the plan. It encroaches upon a core area of labor-management relations which federal labor policy has long committed to the collective bargaining process, protected from the intrusive application of state law.

A state statute of this nature, having this effect, is preempted by the National Labor Relations Act. To the extent Section 47B is applied so as to compel payment of the statutory benefits to employees covered under insured plans which are the product of collective bargaining, it interferes with basic principles of federal labor policy and should not be permitted to stand.

This Court has held that the NLRA preempts state authority in either one of two situations: (1) "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8," *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959) (hereinafter

"*Garmon*"), or (2) where "Congress [has] intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces'." *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm.*, 427 U.S. 132, 140 (1976) (hereinafter "*Machinists*"), quoting *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971). In the present case it is this second line of analysis which applies to Section 47B, for Congress has intended that the selection of substantive terms of collective bargaining agreements, such as health benefits, should be left to the process of negotiation, and thus to the "free play of economic forces." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525-526 (1981) (hereinafter "*Alessi*"); *Teamsters* v. *Oliver*, 358 U.S. 283 (1959) (hereinafter "*Oliver*").

Machinists, *supra*, the key decision in this second line, made it clear that the "crucial inquiry" in questions of NLRA preemption is whether the exercise of state authority "would frustrate effective implementation of the [NLRA's] processes." *Id.* at 147-148. The nature of the opposing federal and state interests must be appraised with a view toward "the potential for interference with federal regulation." *Farmer* v. *Carpenters*, 430 U.S. 290, 300 (1976).

This Court has repeatedly emphasized that the form or focus of a challenged state law, whether it is a law "of broad general application" or a law specifically directed at the labor-management sector, does not matter in determining whether preemption is called for:

> [I]t [has not] mattered whether the states have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations .... Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purpose.

Garmon, supra, at 244. *Accord, Farmer* v. *Carpenters, supra*, at 300; *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 193 (1978); *New York Telephone* v. *New York Dept. of Labor*, 440 U.S. 519, 549-550 (1979) (Blackmun, J., concurring, joined by Marshall, J.).

Thus in the present case the form of Section 47B does not matter. The fact that it is labelled an insurance statute, rather than an industrial relations statute, does not matter. What does matter is the statute's effect, its application. The "crucial inquiry regarding pre-emption" is whether the "exercise," the application, of the state law "would frustrate effective implementation of the [NLRA's] processes." *Machinists, supra*, at 147-148.

Of those processes, one in particular, the collective bargaining process, has received this Court's special protective care. A fundamental principle of federal labor policy is that state statutes will not be permitted to interfere with the parties' free negotiations concerning mandatory subjects of collective bargaining under the NLRA. *Alessi, supra*, at 525-526; *Oliver, supra*. In *H.K. Porter & Co.* v. *NLRB*, 397 U.S. 99, 108 (1970), the Court stated in unequivocal terms that:

> *[T]he fundamental premise* on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

(emphasis added). There is "no room" in the federal regulatory scheme "for the application . . . of . . . state policy limiting the solutions that the parties' agreement can provide . . . ." *Oliver, supra*, at 296.

Section 47B, however, does interfere with the free negotiation of mandatory collective bargaining issues. With respect to health benefits, including mental health benefits, the effect of the statute's application is that the parties are compelled to substitute the state's solution for their own. Although that portion of Section 47B which refers to insurance policies does not expressly, *in haec verba*, direct a change in the terms of an

insured collectively bargained plan itself, the practical effect of the statute's operation in this area is the same as if it had. It was clearly not contemplated, for example, that the administrators of such a plan could simply add the mandated term to the plan's insurance policy, but refuse to make any change in the terms of the plan itself, and then refuse also to make payment of the benefit on the ground that the plan does not provide it. The clear import of the statute's terms is that the mandated benefit is to be paid.

Thus, for an insured benefit plan which is the product of collective bargaining, the practical effect of statutes such as Section 47B is that they simply override the terms of the plan. In the present case this is exactly what happened to the collectively bargained plans of GTE and GE. The judgment of the trial court directed that "the defendants shall pay" the Section 47B benefits, regardless of what the plans themselves may say or not say. App. E at 58a. Where the parties succumb and provide the mandated benefits, a benefit package often results which is disliked by both union and management. Since the parties to collective bargaining have only a limited amount of money to devote to health benefits as a whole, other desired benefits must be reduced or delayed or eligibility requirements stiffened.[4]

Only by relinquishing the security and protection of insurance — an undesirable alternative from the standpoint of both plans and federal labor policy — can employers with collectively bargained benefit plans avoid the necessity of altering

[4] Mr. James M. Dawson, an administrator of several ERISA welfare and pension plans, testified that union members in New Hampshire were "antagonistic" and "belligerent" as a result of that state's mandated mental health benefits law, because "they had to have something they didn't want and to give up something they did want." Many wanted to have or improve "vision and dental" benefits. "But by taking money and spending it for mental health care, that precludes at this time the benefits that they would really like to have." A number of benefit plans increased their eligibility requirements to allow for the mandated benefit. The Northern New England Carpenters Union not only had to increase eligibility requirements, but also "eliminated all vision and dental care under their package."

the plans' terms to conform to the mandate of the statute.[5] The necessity to drop all health insurance (or, alternatively, to drop all health insurance for Massachusetts residents) in order to avoid making changes in collectively bargained benefit terms applicable to Massachusetts residents represents a severe and reprehensible constraint upon the bargaining freedom envisioned by the NLRA. Many employee benefit plans simply cannot or should not assume the risks of operation without the financial security, stability, knowledge and experience that insurance companies can provide.

No matter which choice is made — to succumb to the mandated benefits or to give up insured health benefits altogether — the parties must arrive at a result which differs from the one at which they would have arrived in the absence of the state statute. Thus the conflict with federal labor law does not depend upon which choice the parties make, or upon which choice the state legislature has sought to induce; the conflict inheres in the state-imposed restriction on the parties' freedom of choice. In the end, the effect of Section 47B, when applied in the context of labor-management relations, is equally as intrusive, equally as interfering, equally as frustrating to the NLRA's processes, as would be the effect of a state statute expressly directing the parties to collective bargaining agreements to delete their agreed mental health benefit terms and to insert new terms composed by the Massachusetts Legislature.

In its decision below, the Supreme Judicial Court of Massachusetts recognized that because insured benefit plans have "no choice but to provide mental health care benefits, the insurance provisions of § 47B effectively control the content of

[5] The compulsion exercised by the statute affects more than insurance for mental health benefits alone. Because all group health policies must contain the mandated mental health benefits provisions, no group health insurance is available at all unless the plan acquiesces and changes its collective bargaining agreement to conform to the mandate of the statute.

[such] plans." App. A at 8a. It accordingly conceded that Section 47B does "impose[ ] some limits on the freedom of labor and management to bargain for health benefit terms . . . ." App. A. at 19a. It went on to hold, however, that the state statute was exempt from NLRA preemption on two independent grounds — each one predicated on an unprecedented and erroneous interpretation of federal law.

II. The McCarran-Ferguson Act Does Not Exempt From Preemption State Statutes Which Concern Insurance And Which Conflict With Federal Labor Policies Embodied In The NLRA

Notwithstanding the statute's conceded encroachments upon the collective bargaining of health benefit terms, the court below held that Section 47B was nevertheless excepted from NLRA preemption because of the terms of Section 2 of the McCarran-Ferguson Act. This result was reached despite the fact that another section of the McCarran-Ferguson Act, Section 4, specifically provides that nothing in the Act shall be construed to affect in any manner "the application" of the NLRA to "the business of insurance." The Massachusetts court's interpretation of the scope of Section 4 — an important issue which has never been considered by this or any other federal court — was offered without any analysis or explanation, has no support in the legislative history, makes no sense in the context of the Act as a whole, and is simply wrong.[6]

[6] A threshold question was whether the McCarran-Ferguson Act applied to Section 47B at all. McCarran-Ferguson's protection extends to "any law enacted by any state *for the purpose of regulating the business of insurance* . . . ." Section 2(b), 15 U.S.C. § 1012(b) (emphasis added). The court below first held, however, that the "*purpose*" of Section 47B "*is to protect public health.*" App. A at 22a (emphasis added). Later it retrenched and said that "[a]lthough the purposes and effect of § 47B *extend beyond* regulation of insurance as such," the statute "*operates upon*" insurance and insurance policies. App. A at 18a (emphasis added). Does McCarran-Ferguson's protective cloak extend to state statutes with dominant purposes other than the regulation

This Court has held that the core of "the business of insurance" is

> [t]he relationship between insurer and insured, the type of policy which [can] be issued, its reliability, interpretation, and enforcement

—the focal point being the relationship between insurer and insured. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 560 (1969). The phrase "the business of insurance" appears in a number of places in the McCarran-Ferguson Act.

Section 2(a) of the Act provides that:

> (a) *The business of insurance*, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1012(a) (emphasis added). Section 2(b) says:

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating *the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. § 1012(b) (emphasis added). Section 4 of the Act goes on to provide, however, that:

> Nothing contained in this chapter shall be construed to affect in any manner the application to *the business of insurance* of the [NLRA] . . . .

15 U.S.C. § 1014 (emphasis added).

Thus Congress used the same phrase — i.e. "the business of insurance" — to delineate the basic grant of state authority in Section 2(a), the general immunity from superseding federal legislation in Section 2(b), and the specific reservation of federal

---

of insurance? Does it extend to all aspects of a hybrid statute, with several purposes, only one of which is the regulation of insurance?

regulatory authority under the NLRA in Section 4. It would seem apparent from the language and structure of the Act — giving recognition to the familiar principle of statutory interpretation favoring consistent, harmonious interpretations of identical terms within a single statute — that "the business of insurance" was intended to have the same meaning and scope in all three portions of the Act.

To the extent Section 2(b) grants state regulation of "the business of insurance" a generalized immunity from superseding or preemptive federal legislation, to a corresponding extent the specific excepting provisions of Section 4 make it clear that nevertheless one federal statute, the NLRA, is to have continued applicability to the same "business of insurance."

The Massachusetts court, however, came to the novel and surprising conclusion that the "most reasonable interpretation of [Section 4] is that *labor-management relations within insurance companies* are subject to the NLRA." App. A at 18a, n.25 (emphasis added). The point is treated cursorily, in a footnote. *Id.* No explanation is provided as to why this emasculated version of Section 4's scope is the "most reasonable." No hint is given as to how the words or legislative history can ever lead to this result. The only authority cited is a brief statement in a 1965 decision by the same Massachusetts court — a citation of questionable applicability which also offers no rationale in support of the court's interpretation.[7] The court's footnote concludes with the assertion that the defendants' preemption position is

[7] In the case cited, *John Hancock Mutual Life Ins. Co.* v. *Commissioner of Insurance*, 349 Mass. 390 (1965), the Supreme Judicial Court was not asked, and did not undertake, to define the limits of federal authority reserved in Section 4 of the McCarran-Ferguson Act. It simply dealt with the particular case before it and ruled that it came within the scope of that reservation. It did not hold, as the court below perhaps implied, that Congress' intention was "only" to preserve the applicability of the NLRA directly to the labor relations of insurance companies and their employees. Nor did it hold, as a corollary of this, that Section 4 does not permit the application of the NLRA to state laws regulating the "business of insurance." On the contrary, the holding of *John Hancock* specifically confirmed that the NLRA *does* have application to state

"not . . . reasonable" — but, again, no reason is advanced as to why this is so. If this meager effort at interpreting Section 4 of the McCarran-Ferguson Act is being put forward as one of the two principal bases for immunizing all state insurance statutes from the preemptive effects of federal labor policy, it certainly cries out for plenary reexamination.

To support its reading of Section 4, the Massachusetts court would be forced to attribute radically different meanings to different occurrences of the same phrase within a single statute: "the business of insurance" would be said to have broad meaning when it occurs in Section 2, but very narrow meaning when it occurs in Section 4. This unnatural interpretation is not accompanied by any justification in terms of the policies or legislative history of the Act.

"The business of insurance" inextricably involves state regulations which help to shape "the relationship between insurer and insured" and which govern "the type[s] of policy which [can] be issued," their "interpretation," their "enforcement," and such matters as "licensing" and the "fixing of rates." *SEC* v. *National Securities, Inc.*, *supra*, at 459-460. By preserving, therefore, the continued application of the NLRA to "the business of insurance," Congress in Section 4 of McCarran-Ferguson intended that the NLRA should apply to state insurance laws, and should appropriately preempt such laws whenever they conflict with federal labor policy.

---

laws regulating the "business of insurance" and *does* preempt such a law when its operational effects interfere with federal labor policy.

The Supreme Judicial Court also cited *Wadsworth* v. *Whaland*, 562 F.2d 70, 79 n.44 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978) and *Metropolitan Life Ins. Co.* v. *Whaland*, 119 N.H. 894, 905-906, 410 A.2d 635 (1979) for the proposition that the McCarran-Ferguson Act indicates "that Congress did not intend the NLRA to preempt laws such as § 47B." App. A at 18a. However, both of these decisions simply made brief, passing references to Sections 2(b) of McCarran-Ferguson without any attempt to address the implication of Section 4.

III. Section 47B Is Not Excepted From NLRA Preemption On The Ground That It Is A "Local Health Regulation"

The Massachusetts court's second ground for finding no preemption by the NLRA was based on its characterization of Section 47B as a "local health . . . regulation." Although for purposes of the McCarran-Ferguson Act the same state statute was necessarily held to be an insurance regulation, a "law enacted by [a] state for the purpose of regulating the business of insurance" (App. A at 18a), when the court focused on the possible availability of other exceptions to preemption, the classification was changed. Section 47B became, instead, a law the "purpose [of which] is to protect public health." App. A at 22a. Once the label of state "public health law" was affixed, the court resorted to a dictum in *Oliver*, *supra*, at 297, distinguishing, for purposes of preemption, between "a local health or safety regulation" and "state policy which seeks specifically to adjust relationships in the world of commerce." This reference, the court below concluded, "suggested" that state health and safety regulations are excepted from the requirements of federal labor policy. App. A at 16a.

As the Massachusetts court itself recognized, this Court has never held that a state law is exempt from NLRA preemption on the ground that it is a local health or safety regulation. *See*, App. A at 16a, n.23. Shortly after *Oliver*, in the same year, 1959, the Court restructured its ground rules for federal labor preemption in *Garmon*. An exception for state health and safety regulations was not included. Indeed, since *Garmon*, this Court has alluded to the *Oliver* dictum only once, and this in a footnote wherein the Court refused to pass on its continuing vitality. *See Malone* v. *White Motor Corp.*, 435 U.S. 497, 513, n.13 (1978).

The exceptions to NLRA preemption which this Court has recognized and applied include an exception for state laws reg-

ulating conduct "touch[ing] interests . . . deeply rooted in local feeling and responsibility." *Garmon*, *supra*, at 244. The *Oliver* suggestion of a preemption exception for state health or safety statutes may well have been intended to be subsumed in this later principle enunciated in *Garmon*. However, state mandated benefit insurance statutes such as Section 47B fall outside the carefully structured confines of this exception.

The decisions to which this Court referred in *Garmon* when it spoke of regulated conduct touching "deeply rooted" local interests, as well as the decisions which have applied the *Garmon* language subsequently, were all—without exception—decisions which dealt with "personal torts or violence to property, and their holdings have been closely circumscribed." *Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 504 F. Supp. 54, 66 (M.D. Pa. 1980), *rev'd in part*, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, 71 L.Ed. 2d 295 (1982). *Garmon* itself characterized the cases in this category as cases concerned with state regulation of "conduct marked by violence and imminent threats to the public order," in which the "compelling state interest" was "the maintenance of domestic peace." *Garmon*, *supra*, at 247. *See also*, *Farmer* v. *Carpenters*, *supra*, at 299 ("cases involving violent tortious activity"). Section 47B doesn't fit this mold.

Furthermore, the exemption from NLRA preemption enjoyed by state regulation of this type of conduct is at bottom a logical consequence of the basic preemption rule, not an exception to it. All of these cases concerned state regulation in the form of court actions for damages or injunctions based on state law. All presented preemption issues falling within the first line of preemption analysis and premised upon protection of the primary jurisdiction of the NLRB. The opinions in these cases do not say that the exercise of state authority will be allowed even though it does interfere with the effectuation of federal labor policy by the NLRB. On the contrary, in these cases the Court concluded that the challenged exercise of state court

jurisdiction was permissible only after it determined that the state's action did not present any "realistic risk of interference with the Labor Board's primary jurisdiction to [prohibit] unfair labor practices." *Sears, Roebuck & Co.* v. *Carpenters, supra*, at 198. The issues for the two tribunals were seen to be different. The tortious conduct sought to be regulated by the state was shown to be not federally protected conduct. There was, in short, no need to be concerned about "frustration of national labor policy [by] the exercise of state jurisdiction." *Id.* at 203. See also *Farmer* v. *Carpenters, supra*, at 298 ("... there was little risk that the state cause of action would interfere with the effective administration of national labor policy"); and *Wilkes-Barre Publishing Co.* v. *Newspaper Guild, supra*, at 66 ("The cases that have excepted state tort claims from the preemption doctrine are consistent with the 'frustration' test....").

These cases demonstrate that the fact that a state law embodies "deeply rooted" local concerns is relevant to preemption analysis only insofar as it tends to indicate that enforcement of the state law would not interfere with the NLRA. If, however, a state law *does* interfere with the implementation of federal labor policy, labeling it a law touching "deeply rooted" local concerns will not save it from preemption. Section 47B, of course, does interfere with the free exercise of collective bargaining—the principal policy and "fundamental premise" of the NLRA. *H. K. Porter & Co.* v. *NLRB, supra*, at 108.

The Massachusetts court's action in announcing and relying upon a new, independent preemption exception for state public health laws raises troublesome questions for the future. If it is intended, as it evidently is, that a state "health regulation" shall enjoy exempt status even though it may interfere with federal labor policy, what exactly is the label "health regulation" meant to encompass? Does it refer to statutes directly regulating health care, or will a more indirect and tangential relationship to "health" suffice? Does it include a state statute with multiple purposes — only one of which is the regulation of "health"? Is it

essential that the state statute at least deal with some serious or important health problem? Or will any health regulation, no matter how inconsequential, qualify?"[8]

Implicit in the Massachusetts Supreme Judicial Court's approach to the question of NLRA preemption is the thought, unstated but nevertheless suggested, that if the state's interest could be said in some sense to outweigh the federal interest, conflict between the state statute and the NLRA should be overlooked and preemption denied. Along this line, the Court concluded that section 47B is "addressed to a statewide health

[8] Whether Section 47B can be properly characterized as the type of conventional "local health regulation" the *Oliver* dictum had in mind is questionable. Section 47B's regulations focus on, not specified requirements for protecting the public health (*Cf.*, *e.g.*, statutes directly regulating such matters as sanitary codes, G.L. c. 111, § 127A; lead poisoning, G.L. c. 111, §191; or air pollution, G.L. c. 111, §31 C), but *who must pay* for certain mental health care benefits, and to what extent. The report of the Joint Committee on Insurance of the General Court indicated that mental health care was already "costing Massachusetts taxpayers millions of dollars annually," and that the solution, the Legislature felt, lay in the private sector, with employers. The report emphasized that "there is a great potential for increased revenue to the commonwealth because of 3rd party payments from insurance companies." App. C at 40a. Prior to Section 47B's passage, studies were made of insured employee benefit plans around the country. The statute, as applied, principally bears upon the employer-employee relationship. As the parties stipulated and the trial court found, "the preponderance of insurance policies affected by G.L. c. 175, § 47B have been issued to employers." App. C. at 31a.

As a result, to revert to the *Oliver* dictum, Section 47B, rather than being a "local health regulation," is more nearly akin to a state statute "which seeks specifically to adjust relationships in the world of commerce." *Oliver*, *supra*, at 297. As such, it has no special claim to exemption from NLRA preemption. Moreover, it would appear to be precisely that type of state statute as to which preemption is most appropriate—*i.e.* a statute "resting upon [the state Legislature's] views concerning accommodation of the . . . interests" of employers, employees and the public, *Machinists*, *supra*, at 140, n. 4, quoting A. Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972). It represents an assessment by the state legislature that the Massachusetts worker needs assistance; that collective bargaining is not moving fast enough in the mental health benefits area; and that to help rectify this situation a new accommodation of the interests of the worker, the employer and the public will be made through the mechanism of mandated insurance.

problem," whereas its impingement on collective bargaining freedom, although undeniably present, was not an "absolute" restriction, because parties could preserve their freedom to negotiate mental health benefits by electing to give up all health insurance. *See*, App. A at 19a.

Quite apart from the fact that the decision whether or not to insure health benefits is itself protected by the NLRA from state interference and the fact that being forced to relinquish all health insurance in order to retain freedom to bargain over mental health benefits is certainly a serious interference with the collective bargaining process, the overall premise of the Massachusetts court's approach is incorrect. This Court has not subscribed to any simple balancing test for resolving NLRA preemption issues. In both *Machinists* and *New York Tel. Co.* v. *New York Labor Dept.*, *supra*, a majority of the Court ruled that a presumption of preemption is raised by a state law's interference with federal labor policy—a presumption that can be rebutted in only three carefully defined ways. A claim that the state's interest "outweighs" or "counterbalances" the federal interest is not one of them.[9]

[9] The three permissible methods for rebutting the presumption of preemption are: (1) a showing that the state statute is only "of peripheral concern" to federal labor policy; (2) a showing that the state statute falls within a narrow class of cases exempting state regulation of violent and tortious conduct touching "deeply rooted" local interests; and (3) a showing that some federal statute other than the NLRA evidences a clear Congressional intent to tolerate the particular state regulation in question, despite its transgressions upon federal labor policy.

CONCLUSION

For the foregoing reasons, the decision below should be summarily reversed or probable jurisdiction noted.

Respectfully submitted,

LANE MCGOVERN
STEVEN A. KAUFMAN
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100
Attorneys for Appellant,
The Travelers Insurance Company

August 20, 1982